

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 8, 2009 Session

ROBERT NICELY v. BERKLINE, LLC

**Appeal from the Circuit Court for Hamblen County
No. 05CV061 Thomas Wright, Judge**

No. E2009-00208-COA-R3-CV - FILED JULY 7, 2009

Robert Nicely ("Plaintiff") was employed as a truck driver for Evinco Professional Services, Inc. ("Evinco"). Evinco contracted with Blue Mountain Trucking Corporation for the delivery of various goods. In March 2004, Plaintiff was injured while unloading furniture that had been loaded onto his truck by employees of Berkline, LLC. Plaintiff sued Berkline, LLC, ("Defendant") for personal injuries. Defendant filed a motion for summary judgment claiming that an employment agreement signed by Plaintiff barred this lawsuit. The Trial Court disagreed and allowed the case to go to the jury. The jury returned a verdict for Plaintiff in the amount of \$500,000. Because the jury found Plaintiff 20% at fault for his own injuries, the judgment was reduced to \$400,000. Defendant thereafter filed a motion for a new trial or for a remittitur, both of which the Trial Court denied. Defendant appeals. Finding no error, we affirm the judgment of the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Joshua A. Wolfe, Knoxville, Tennessee, for the Appellant, Berkline, LLC.

Larry V. Roberts, Kingsport, Tennessee, for the Appellee, Robert Nicely.

OPINION

Background

This personal injury lawsuit was filed by Plaintiff in March 2005, and arises out of injuries Plaintiff claimed to have received while unloading furniture from a truck that had been loaded by Defendant's employees. According to Plaintiff, at the time of the accident:

Plaintiff . . . was injured when furniture negligently loaded by employees of Defendant Berkline, LLC fell on him while he was unloading the furniture from the trailer.

Plaintiff . . . was a tractor trailer operator for Evinco Professional Services, Inc., and Blue Mountain Trucking Corporation. When the accident occurred, Plaintiff . . . was unloading furniture from his trailer that was negligently loaded onto the trailer by Defendant Berkline, LLC and its employees on or about March 18, 2004 in Morristown, Hamblen County, Tennessee.

The employees of Defendant Berkline LLC were negligent, in that among other things, they failed (1) to load and secure the furniture in the trailer such that the furniture would not fall on Plaintiff . . . when he was unloading the furniture while making his delivery for Defendant . . . and (2) to adhere to Federal, State or other rules and regulations regarding training and loading of trailers, all of which will be identified after discovery and when Defendant . . . permits Plaintiff . . . to conduct an inspection of the loading facility.

As a result of the negligence of Defendant Berkline, LLC's employees, Defendant . . . is responsible to Plaintiff . . . [under the] doctrine of respondeat superior. Further, Defendant Berkline, LLC was negligent in that it failed to properly train and supervise its employees to load the trailer.

As a result of the negligence of Defendant Berkline, LLC and its employees, Plaintiff . . . sustained physical and emotional injuries, including to his right shoulder and arm. . . .

Defendant responded to the complaint, generally denying that any of its employees were negligent and further denying any liability to Plaintiff. Defendant then filed a motion for summary judgment claiming, inter alia, that Plaintiff had signed an employment agreement with his employer, Evinco, and that document effectively released Defendant from any liability for negligence. In support of this motion, Defendant filed the affidavit of Larry Winstead who explained, among other things, that Blue Mountain Trucking Corporation ("BMT") and Defendant Berkline, LLC, both were wholly owned subsidiaries of Berkline/Benchcraft, LLC.

Plaintiff's employer, Evinco, had contracted with BMT for delivery of the furniture that Plaintiff was injured while unloading. As mentioned previously, at issue in this case is an employment agreement between Plaintiff and Evinco. This employment agreement provides that BMT is the "client" to which Plaintiff was being assigned. The agreement was signed by Plaintiff on January 27, 2003, and states, in relevant part, as follows:

**BEST DRIVERS/EVINCO DRIVER SERVICE
BLUE MOUNTAIN TRUCKING ASSIGNED DRIVERS
OVER THE ROAD**

I understand that the following pay rates will be in force for services that I perform for **Blue Mountain Trucking**, a Best Drivers leasing client to which I have been assigned.

* * *

Cost or damages claimed by client may be deducted from my pay. I understand that I may be required to report to duty within a 100 mile radius of my residence. All client required paperwork must be turned into client management by 8:00 a.m. each Monday. I understand that failure to do so will result in at least one more week's delay in getting paid. The cost for wire fees, trip advances, postage due, etc. may be deducted from my pay. I have read and understand the Best Drivers/Evinco "Professional Driver Employment Policy." I agree that the limit of liability for work injuries and illnesses is that which is covered by the Best Drivers/Evinco state required workers' compensation regulations and to hold Best Drivers/Evinco and it's (sic) clients harmless from any and all other injury or loss of consortium claims. (emphasis in the original)

Based on the forgoing agreement, Defendant argued in its motion for summary judgment that it was one of Evinco's clients and, therefore, Plaintiff had waived any negligence claim against it.¹ The Trial Court denied Defendant's motion for summary judgment, although there is no order reflecting that denial contained in the record on appeal and there is no transcript from the hearing on the motion.

A three-day jury trial was held in August 2008. Defendant moved for a directed verdict following the close of Plaintiff's proof and again at the close of its own proof. The basis for the motion was that Plaintiff's claim was barred by the employment agreement quoted above. The

¹ Defendant also argued that it was a statutory employer and Plaintiff's tort claim was barred by the exclusive remedy rule found in the Workers' Compensation Act. This argument was rejected by the Trial Court and that finding is not at issue on appeal. As a side note, Plaintiff did file a workers' compensation claim against Evinco and that claim settled for \$55,000 plus open medicals, which equated to an "overall industrial disability rating of approximately 28%" to the body as a whole.

Trial Court denied the motion for directed verdict. Following deliberations, the jury initially determined that Defendant was 80% at fault for Plaintiff's injuries, and Plaintiff was 20% at fault. The jury then awarded Plaintiff a monetary judgment which was set forth on the jury verdict form as follows:

What is the total amount of damages sustained by [Plaintiff]?

Consider each element and fill in the amount for each, if any, you find have been proved by a preponderance of the evidence.

[A]nswer:

a.	medical care, services and supplies	\$18,000.00
b.	physical pain and suffering - past	\$100,000.00
c.	physical pain and suffering - future	\$50,000.00
d.	mental or emotional pain and suffering - past	\$75,000.00
e.	mental or emotional pain and suffering - future	\$25,000.00
f.	loss of ability to enjoy life - past	\$20,000.00
g.	loss of ability to enjoy life - future	\$8,032.50
h.	loss of earnings -	\$166,882.50
i.	loss of earnings - future	\$37,085.00
Total		\$500,000.00

Because the jury found Plaintiff 20% responsible for his own injuries, the judgment was reduced to \$400,000 based on comparative fault principles.

Following entry of the judgment incorporating the jury's verdict, Defendant filed a motion for a new trial and a motion for a remittitur. The motion for a new trial was denied by the Trial Court, but the Trial Court did remit the verdict by \$222.97.² Defendant appeals. Although not stated exactly as such, Defendant claims the Trial Court erred when it denied its motion for directed

² Plaintiff's stipulated medical bills totaled \$17,777.03, but the jury awarded Plaintiff \$18,000 for medical bills. Accordingly, the Trial Court, with the agreement of both parties, remitted that part of the judgment by \$222.97.

verdict on the basis that Plaintiff's negligence claim was barred by the employment agreement. Next, Defendant argues that the Trial Court erred when it denied its motion for a new trial on the basis that Plaintiff failed to establish liability on the part of Defendant. Finally, Defendant asserts that the Trial Court erred when it failed to remit the verdict by more than \$222.97.

Discussion

The first issue we address is whether the Trial Court erred when it refused to grant a directed verdict in Defendant's favor based on the language of the employment agreement between Plaintiff and Evinco. In *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885 (Tenn. 2002), our Supreme Court stated:

In "resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). This determination of the intention of the parties is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide. 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); *Doe v. HCA Health Services of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001).

A court's initial task in construing a contract is to determine whether the language of the contract is ambiguous. Once found to be ambiguous, a court applies established rules of construction to determine the parties' intent. "Only if ambiguity remains after the court applies the pertinent rules of construction does [the legal meaning of the contract] become a question of fact" appropriate for a jury. *Smith v. Seaboard Coast Line R.R. Co.*, 639 F.2d 1235, 1239 (5th Cir. 1981). . . .

The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. *Empress Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190 (Tenn. 1973). The intent of the parties is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." 17 Am. Jur. 2d, *Contracts*, § 245, quoted in *Turner*, 503 S.W.2d at 190. If clear and unambiguous, the literal meaning of the language controls the outcome of contract disputes.

Planters Gin, 78 S.W.3d at 889-890.

When denying Defendant's motion for directed verdict following presentation of the parties' proof at trial, the Trial Court stated as follows with regard to the employment agreement:

[W]ith regard to the release issue and the entitlement to a directed verdict on that, . . . I still feel the same about it even after hearing the testimony, and they can bring the whole company in here to testify that, you know, Berkline was the client. But clearly, there was a reason they set up a separate corporation to be their contract trucking company, and it was [Blue Mountain Trucking Company] who was the client, I find, and find that there's no – the contract is clear. It's not – doesn't need a lot of interpretation, doesn't need any interpretation really.

It's just Berkline wasn't the client of Evinco, and therefore, Berkline's not entitled to hide behind the release, although Blue Mountain probably would be. . . .

On appeal, Defendant quite correctly points out that its representative and an Evinco representative testified at trial that Defendant was indeed a client of Evinco. Defendant introduced at trial a separate contract between BMT and Evinco "for services provided to [BMT], for dedicated private fleet operations to Berkline Benchcraft Holdings, LLC." Defendant claims this contract shows that Defendant was a client of Evinco.³

We disagree with Defendant and concur with the Trial Court's decision that this separate contract does not win the day. At issue in this case is the effect of the agreement signed by Plaintiff, not the contract between Evinco and BMT. The agreement signed by Plaintiff identifies BMT as the client and nowhere is Defendant or Berkline Benchcraft Holdings, LLC, mentioned. The agreement mentions "client" several times and clearly is referring only to BMT, which is the client to which Plaintiff was assigned. Then suddenly and only once the word "clients" is used. Defendant claims that because "clients" is used in the very last sentence, all of a sudden this agreement is intended to release numerous other unidentified separate corporations. If in fact it was the intent to include Defendant Berkline, LLC, as a client, this is far from clear. As stated in *Planters Gin*, *supra*, "[t]he intent of the parties is presumed to be that specifically expressed in the body of the contract." 78 S.W.3d at 890. When looking at the body of the contract at issue, we cannot conclude as a matter of law that the Trial Court erred when it concluded that the agreement was referring only to BMT as the client of Evinco and, therefore, Defendant Berkline, LLC, could not rely on the agreement as a bar to the present negligence lawsuit.

³ This contract does not mention Defendant Berkline, LLC, other than to say that all drivers presently assigned to Berkline, LLC, were being reassigned to BMT. This document also identifies BMT as Evinco's "Client." As stated previously, Berkline, LLC, and Berkline Benchcraft Holdings, LLC, are separate corporate entities.

Defendant's next issue is whether the Trial Court erred when it denied its motion for a new trial as to the jury's finding that Defendant was 80% responsible for Plaintiff's injuries. Our standard of review pertaining to the denial of a motion for new trial is set forth in *Barnes v. Goodyear Tire and Rubber Co.*, 48 S.W.3d 698 (Tenn. 2000):

The standard of appellate review when reviewing a jury verdict approved by a trial court is whether there is any material evidence to support the verdict. Tenn. R. App. P., Rule 13(d). When addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence. *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978); *Black v. Quinn*, 646 S.W.2d 437, 439-40 (Tenn. App. 1982). Appellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies. If the record contains "*any material evidence* to support the verdict, [the jury's findings] must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury." *Crabtree Masonry Co.*, 575 S.W.2d at 5. (emphasis added)

Barnes, 48 S.W.3d at 704-705.

Defendant claims that the evidence fails to support a verdict as to liability because Plaintiff's testimony was inconsistent as to exactly how the accident happened and whether he had preexisting medical problems. When denying the motion for new trial, the Trial Court stated:

I don't think that it's a case where I should as a thirteenth juror set aside the work of the trial jury. There's testimony, there's proof to support the plaintiff's theory and the jury's holding regarding the determination of the relative fault of the parties. Clearly, they worked on that diligently and weren't just trying to award a bonanza to [Plaintiff].

They, I think, took into account the fact that he probably should have been a little more careful when he opened the door of that trailer, and they cut him twenty percent. So I think the jury understood the charge, and they listened carefully to the proof and they made a determination, as I've already indicated, that's certainly supported by the testimony and the demeanor, the credibility particularly of [Plaintiff]. It just came out good . . . it did in this trial come out well for [Plaintiff], the demeanor, the credibility, and the tenor of the proof.

And it didn't come out ill for Berkline. I mean . . . the jury wasn't out on a witch hunt to try to get Berkline, I didn't think either, because there wasn't anybody that was really vindictive towards Berkline including [Plaintiff]. He just said that the people that stacked the boxes up inside the trailer didn't do it right, did it so that it was liable to get him hurt, which [is what] happened.

We agree with Defendant that Plaintiff's testimony was, at times, inconsistent. Defendant's attorney quite properly focused on these inconsistencies during the trial and the jury was required to determine whether these inconsistencies were sufficient to result in a verdict for Defendant. The jury ultimately concluded the Plaintiff was credible and that the proof was not sufficient to result in a defense verdict, but it was sufficient to apportion some fault to Plaintiff. The specific issue on appeal is not whether this Court agrees with the verdict. Rather, the issue before us is whether there is *any material evidence* to support the verdict as to liability. Plaintiff's testimony as to how the accident happened and the injuries he received, albeit somewhat inconsistent, nevertheless is material evidence sufficient to support the jury's verdict as to liability and causation.

The final issue is Defendant's claim that the trial court erred in not remitting the verdict by more than \$222.97.⁴ In essence, this issue is really a claim that the Trial Court erred when it failed to grant a remittitur and, for all intents and purposes, we are reviewing a jury verdict that has been approved by the Trial Court. As with the previous issue, our standard of review on this issue is whether there is any material evidence to support the amount of the verdict. "This review questions whether material evidence can be found in the record that would support an award . . . [as being within] the range of reasonableness, giving full faith and credit to all of the evidence that tends to support that amount." *Smartt v. NHC Healthcare/McMinnville, LLC*, No. M2007-02026-COA-R3-CV, 2009 WL 482475, at * 20 (Tenn. Ct. App. Feb. 24, 2009), *perm. app. pending* (quoting *Poole v. Kroger Co.*, 604 S.W.2d 52, 54 (Tenn.1980)). "[A] finding of excessiveness necessarily involves a determination of the dollar figure that represents the point at which excessiveness begins, and that figure is the upper limit of the range of reasonableness." *Smartt*, 2009 WL 482475, at * 21 (quoting *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125, 129 (Tenn. 1980)). As this Court stated in *Duran v. Hyundai Motor America, Inc.*, 271 S.W.3d 178 (Tenn. Ct. App. 2008):

The amount of a verdict alone can be so large that it reflects passion, prejudice, or caprice. *Am. Lead Pencil Co. v. Davis*, 108 Tenn. 251, 258, 66 S.W. 1129, 1130 (1901). However, the appellate courts may step in and invalidate a judgment based on a jury's verdict only when there is no material evidence to support the verdict, *McCullough v. Johnson Freight Lines, Inc.*, 202 Tenn. 596, 604, 308 S.W.2d 387, 391 (1957), or when the amount of the verdict is so excessive or unconscionable that it shocks the judicial conscience and

⁴ As noted previously, neither party objected to the verdict being remitted by \$222.97, which is the amount the jury verdict for medical expenses exceeded the stipulated amount of medical bills.

amounts to a palpable injustice, *Johnson v. Woman's Hosp.*, 527 S.W.2d 133, 142-43 (Tenn. Ct. App. 1975); *Harrison v. Wilkerson*, 56 Tenn. App. 188, 196, 405 S.W.2d 649, 652-53 (1966). When asked to determine whether a verdict should be set aside based on the amount of the damage award alone, the courts must consider the nature and extent of the plaintiff's injuries, the pain and suffering the plaintiff experienced, the expenses the plaintiff incurred as a result of the injuries, the plaintiff's loss of earning capacity as a result of the injuries, the impact the injuries have had on the plaintiff's enjoyment of life, and the plaintiff's age and life expectancy. *Holt v. McCann*, 58 Tenn. App. 248, 256, 429 S.W.2d 441, 445 (1968); *Nash-Wilson Funeral Home, Inc. v. Greer*, 57 Tenn. App. 191, 203, 417 S.W.2d 562, 567 (1966).

When the conduct of a jury is challenged, the appellate courts begin with a presumption that juries are honest and conscientious and they have followed the instructions given to them. *State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004); *State v. Williams*, 977 S.W.2d 101, 106 (Tenn. 1998). . . .

Duran, 271 S.W.3d at 212 (footnote omitted).

As discussed previously, the jury assigned specific dollar amounts to various components of recovery. Accordingly, Defendant cannot simply claim that the total amount was excessive. Rather, Defendant must specifically show which of the various components are excessive to the point that they reflect passion, prejudice, or caprice.

Plaintiff's primary treating physician was Dr. Edwin Spencer. Dr. Spencer diagnosed Plaintiff with right shoulder adhesive capsulitis and a right shoulder rotator cuff tear. In August 2004, surgery was performed. Specifically, Dr. Spencer performed a "post capsular release as well as rotator cuff repair on the right shoulder." Plaintiff underwent physical therapy after the surgery and reached maximum medical improvement in April 2005. Dr. Spencer assigned a 19% permanent partial disability to the right upper extremity, which equated to a permanent partial disability of 11% to the body as a whole. It appears that Plaintiff's most recent visit to Dr. Spencer was on June 27, 2008. At that time, Plaintiff was complaining of pain and stiffness in the lateral aspect of his shoulder. A functional capacity evaluation indicated that Plaintiff "does not meet the physical demands of previous employment (Truck Driver) which required exertion several times heavier and much more frequently than he is currently capable of."

Norman Hankins ("Hankins") testified as an expert witness for Plaintiff. Hankins performed a vocational assessment on Plaintiff. Hankins testified that Plaintiff completed the eighth grade but was functioning at a second grade level. Based on the restrictions placed on Plaintiff's physical ability and after reviewing Dr. Spencer's records and the functional capacity evaluation, Hankins stated that Plaintiff would no longer be able to drive a semi-truck. For the nine-year period immediately preceding the injury, Plaintiff's annual earnings averaged \$37,085. Hankins concluded

that Plaintiff's lost wages from the date of the accident up until the date Hankins prepared his report was \$184,125. As to future lost wages, Hankins stated that Plaintiff's life expectancy was 16.1 years. Based on Plaintiff's life expectancy, Hankins determined that Plaintiff's future lost wages were \$159,563, discounted to present value.

On appeal, Defendant focuses exclusively on certain aspects of Plaintiff's testimony that benefitted Defendant. For example, Plaintiff acknowledged that he could drive, that he could do some farm work, and that he was able to do enough work to "get by."

The precise issue we are confronted with is whether there was any material evidence to support the amount of the jury's verdict. The issue is not whether there was evidence that would have supported a lower verdict. While we have not discussed all of the evidence favorable to Plaintiff, what we have set forth above sufficiently demonstrates that there was material evidence to support the amount of the verdict. While the verdict may well have been on the high end of the range of reasonableness, it was, nevertheless, within that range. The Trial Court's refusal to grant a remittitur is affirmed.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Circuit Court for Hamblen County solely for the collection of costs below. Costs on appeal are taxed to the Appellant, Berkline, LLC, and its surety, for which execution may issue, if necessary.

D. MICHAEL SWINEY, JUDGE